W Jackson Walker LLP HR that Makes a Difference **Avoiding Labor and Employment Nightmares: Strategies for Reducing Risk and Protecting Your Workforce** May 20, 2021 12:30 - 3:30 PM

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Triaging Employment Issues For the non-employment lawyer

Jackie Staple Jackson Walker

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Labor and Employment Laws

- Discrimination and harassment
- Wage and hour
- Unfair competition, trade secrets
- Labor
- Health and safety
- Leaves of absence
- Discipline and terminations
- Employee information

Discrimination

Employee is in a protected class. Can we fire the employee?



Discrimination

Discriminatory motive?

Motivating factor?

Retaliation

Employee filed a charge. Can we fire the employee?



Retaliation

Retaliatory motive?

Timing?

Wage and Hour

There is a new position. Can we pay a salary?



Wage and Hour

Salary is code for "exempt"

What does the position do?

Our old employee now works for our competitor. Can we stop him/her?



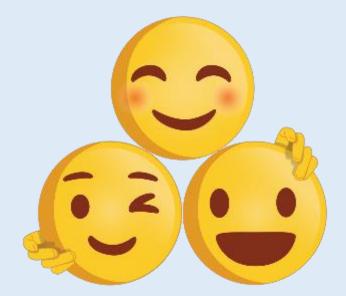
Unfair Competition and Trade Secrets

Is there an agreement?

Are trade secrets at issue?

Labor

A union might be trying to organize. Can we stop it?



Labor

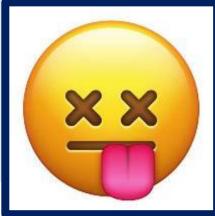
Do managers know what to say?

Are materials being passed out?

Health and Safety

An employee is seriously hurt/died.

What do we do?



Health and Safety

Did you report?

Did you secure the area?

Leaves of Absence

An employee asked for time off. Do we have to give him/her time?



Leaves of Absence

FMLA? Paid sick leave? ADA? STD? Workers' Comp? Policy? Other leave? PTO?

Discipline and Termination

An employee broke company policy. Can we fire him/her?



Discipline and Termination

At-will or contract?

What policy applies? Consistent?

A letter/document asks for employee's information. What do we have to give?



Employee Information

Authorization Subpoena State law W Jackson Walker LLP

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Continuing COVID Issues that Survive the Pandemic

Brooke Willard Jackson Walker

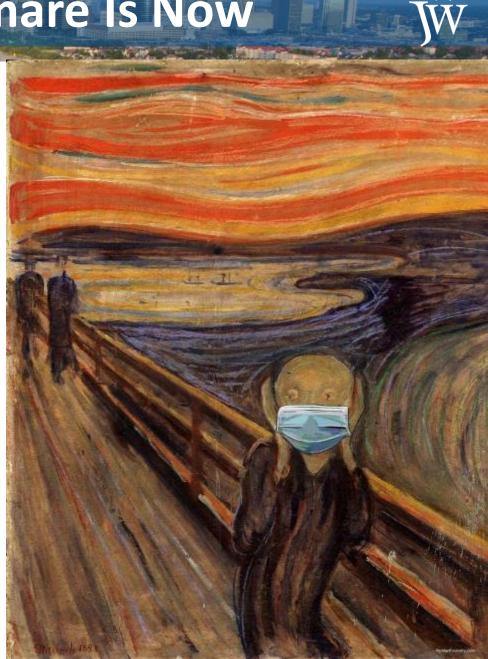
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The Nightmare Is Now

1. VACCINES

2. MASKS

3. PAID SICK LEAVE



Can Employers Mandate COVID-19 Vaccines?

Emergency use authorization v. FDA licensed approval EEOC guidance Title VII & ADA exceptions



Should Employers Mandate COVID-19 Vaccines?

ASSESS BUSINESS NECESSITY

- PROS
 - Efficiency
 - Public Relations

- CONS
 - 100% vaccination not likely
 - Employee morale
 - Vaccine availability
 - Increased risk of litigation
 - Administrative burden

Requiring Proof Of Vaccination

Can require proof But do not ask subsequent questions

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Masks

New CDC guidance





OSHA's silence

Employer policies should still be observed

Paid Sick Leave – Employers' Choice

Extended to September 30th 1-499 employees Tax credits Non-discrimination rules



3 New Qualifying Reasons

Getting vaccine Vaccine recovery Waiting on test results



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Reducing Risk in FLSA Collective Actions

Lonnie Schooler Jackson Walker

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- The FLSA Collective Action
- The Nightmare Scenario
 - Employee unhappy about wages
 - Employee finds lawyer (advertising on a billboard!)
 - Employee sues your company
 - Employee then seeks to add every single current and former employee to the lawsuit
 - Here's how to protect the company

- THE THREE MOST IMPORTANT ITEMS FOR DEFENDING FLSA LAWSUITS (THREE D'S)
 - Documentation
 - Documentation
 - Documentation

- WHAT KIND OF DOCUMENTATION IS IMPORTANT?
 - PAYROLL
 - JOB TITLES
 - JOB DUTIES

- Overtime Issues
 - INDEPENDENT CONTRACTOR STATUS (5-PART TEST)

- Overtime Issues
- "Exempt" Classification
 - Salary Basis
 - Guaranteed Rate
 - Current Controversy
 - Duties Basis

- Overtime Issues
 - TIME ACTUALLY WORKED [DOCUMENTATION IS THE KEY]
 - Remote / Virtual Work
 - Activities Related to Work [Donning / Doffing]
 - Travel to work site

- Minimum Wage Claims
 - PROPER RECORDKEEPING
 - DEDUCTIONS REDUCING WAGE PAID TO BELOW MINIMUM LEVEL
 - DIFFERENT LAWS IN DIFFERENT STATES

- Collective Action
 - WHAT IS IT?
 - How does it work?
 - WHAT'S THE BIG DEAL ABOUT JOB TITLES/JOB DUTIES? ("SIMILARLY SITUATED" STANDARD)
 - INFORMATION TO FURNISH FOR NOTICE

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Avoiding Landmines Reducing Litigation Risk through Effective Diversity, Equity & Inclusion Plans Jamila Brinson Jackson Walker

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The Nightmare



Diversity, Equity & Inclusion



Why It Benefits Business

- Optimizes business performance
- Creates conducive workplace
- Maximizes employee value & satisfaction
- Meets employee, client, public expectations
- Reduces litigation risk
 - Affirmative defense



Legal Considerations

- <u>Trump Administration</u>
 - Executive Order 13950
 - Focus \rightarrow No Race & Sex Stereotyping
 - U.S. Labor Inquiry \rightarrow diversity plans
 - Anti-American training hotline
- <u>Biden Administration</u>
 - Executive Order 13985 (revoked 13950)
- Focus → Comprehensive
 approach to advancing equity for all,
 particularly marginalized communities of color



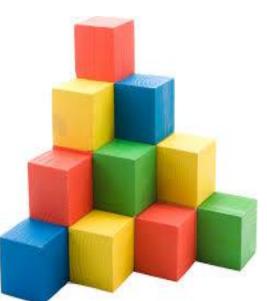
The Landmines

- Lack of Management Buy-in
- Employee Misperception → Reverse Discrimination
 Claims
- Legally Non-compliant Policies, Programming or Practices
- Other Litigation Risk
 - Critical Race Theory
- Reputational Risk



The Key Components

- Dedicated Personnel & Focus
 - Reporting Structure \rightarrow CEO/Board/Owner
- Workplace Culture Assessment
 - Concerns/Gaps, Data Collection & Analysis
- Clear Strategy aligned with Business Objectives
- Implementation
 - Measurable goals and objectives
 - Across spectrum of employment decisions
- Evaluation
- Revision (as needed)



What Can Companies Legally Do?



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- <u>Dedicated Personnel & Focus</u>
 - Top down commitment; time & resources
 - Articulation of expectations & promotion within culture
 - Overall strategy—<u>not</u> quotas
- Workplace Culture Assessment
 - Customized (people, policies, culture)
 - Voluntary
 - Incentives







<u>Clear Strategy</u>

Alignment of mission, goals, strategy

- Supported by Culture
- Affirmative Action Plan
 - Manifest imbalance analysis
 - S.M.A.R.T. goals

VISION STRATEGY BOUND BY DEFINES RULES OF SUCCESS TACTICS DUTCOME BOUND BY DEFINES RULES OF ENGAGEMENT

Implementation

- Recruiting \rightarrow qualified, diverse pools; expect will promote DEI
- Hiring \rightarrow 1st qualifications, diversity as plus factor
- Training \rightarrow cross-cultural collaboration, workplace bias, etc.
- Employee Resource Groups \rightarrow dedicated focus, open to all
- Accountability



- Evaluation & Revision
 - Track Relevant Factors
 - Measurable
 - Voluntary
 - At Regular Occurrences
 - Perform Analyses
 - Make Modifications, as needed
 - Goals
 - Culture
 - Training
 - Programming
- Right. Smart. Crucial.



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Let's take a short break!

5 minutes

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HR that Makes a Difference

Before the Cat's Out of the Bag: Practical Considerations for Preserving the Secrecy of Confidential Information Dawn S. Holiday Jackson Walker

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Protecting the Secret Sauce

TEX. CIV. PRAC. & REM. CODE ANN. § 134A.002

- Reasonable measures
- Economic value
- Secrecy = Confidential?



The Secret is in Details

- Written policies
- Employer's obligations
- Employee's obligations
- Restrictive Covenants



Who Can Keep a Secret?

- Access restrictions
- Transfer of information
- Tracking
- Stamping
- Monitoring
- Expectation of privacy



Threat of Disclosure?



- Internal investigation
- Virtual/electronic environment
- Device management
- Termination of access

When the Secret's Out...



- Aggressive approach
- Immediate action
- Forensic analysis
- Available remedies

When in Doubt...



- Protection
- Procedures
- Prosecution

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Employee Raiding: Myths, Maxims, and Mitigation

G. Scott Fiddler Jackson Walker

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The Nightmare



The Nightmare



Myths



Employee raiding is unlawful Employee raiding is a stand-alone claim



Guiding principles:

- Free to Choose
- Free movement of labor
- Freedom to hire



Competing interests

- Employee
 - Freedom
 - Seek highest wage
- Current employer
 - Protect investment
 - Protect CI/TS
- Future employer
 - Hire who they want
 - Hire the best





General rule:

- Free to raid/hire/poach except:
 - Contract
 - Tortious Interference
 - Trade Secrets / Cl
 - Induce Fiduciary Duty Breach
 - Unfair Competition (Texas?)



Some examples:

- *Herider Farms-El Paso, Inc. v. Criswell,* 519 S.W.2d 473 (El Paso 1975);
- Bray v. Squires, 702 S.W.2d 266 (Hou. [1st] 1985);
- Abetter Trucking Co. v. Arizpe, 113 S.W.3d 503 (Hou. [1st] 2003);
- UATP Mngmt, LLC v. Leap of Faith Adventures, LLC, 2020 WL 6066197 (Fort Worth 2020).

Mitigation



What no to do:

Agreeing with competitors

- United States v. Adobe Systems et al.
- Adobe, Apple, Google, Intel, Pixar
- Sherman Anti-Trust Act
- Final Judgment: Enjoining defendants from agreeing not to compete for labor

Mitigation

Against being raided:

- Restrictive Covenant Agreements
- Non-Disclosure Agreements
- Protect/mark CI/TS



Mitigation

In raiding:

- Communicate serially
- Contractually disclaim RCA/TS/CI
- No work before hire
- Hire to get people, not business



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Are Your Frontline Managers Assets or Liabilities in the New Era of Work?

Kelly Yeates Vice President, Service Operations Insperity





Frontline Leadership Responsibilities Have Changed



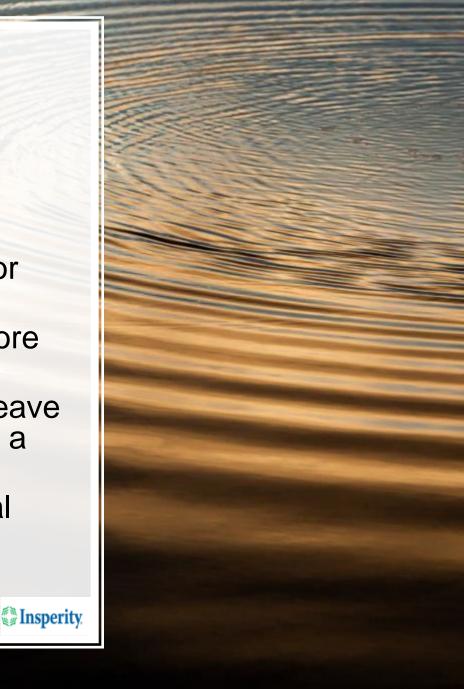
New Dynamics + New Environments

New Risks for Managers to Navigate

Insperity:

Burnout Causes a Ripple Effect

- Burnout is often followed by disengagement and turnover.
- Burnout is a force multiplier for employee frustrations.
 - Disengaged workers are more easily disgruntled.
 - Employees who decide to leave may be more inclined to file a complaint.
- Burnout erodes organizational culture.





Virtual Environment Challenges

- The pandemic has given employers windows into employees' personal lives.
- Remote work environments can blur boundaries between office/home and between work/personal discussions and activities.
- Do your managers know how to navigate the boundaries?





Discrimination, Harassment and Retaliation

- COVID has added new complexities to complaints related to age, national origin, pregnancy and retaliation.
- Employee activism on racial and social justice matters puts spotlights on employment practices.
- Managers play a critical role in recognizing and responding to employee complaints and concerns.

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ADA and Accommodation Complaints Related to COVID

- Uptick in cases alleging lack of accommodation for physical or mental disabilities.
- Accommodating employees' COVID-related illnesses can be challenging.
- Do your managers know how to recognize and respond to accommodation requests?

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What's Needed from Frontline Leaders?

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Managing Effectively in Virtual and Hybrid Environments Remote employees are more likely to feel excluded or unsupported.

Hybrid workforces add to managers' responsibilities for team engagement and morale.

Managers must be perceived as readily accessible by remote staff.

Requires managers to make one-to-one meetings with employees a priority.





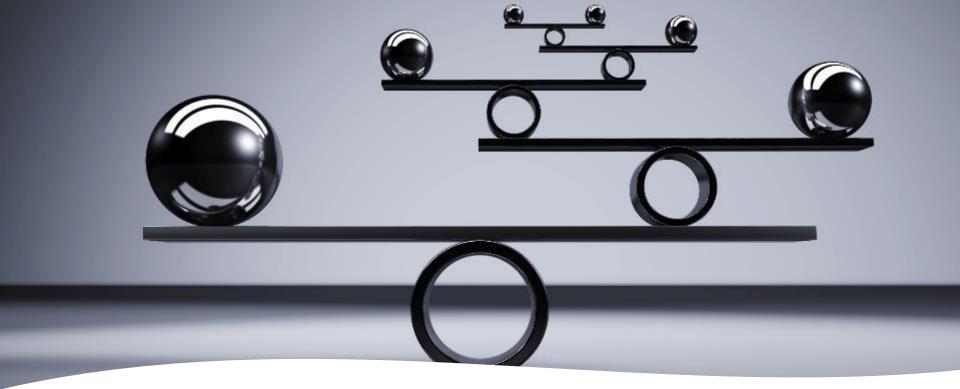
Supporting Employee Health & Wellbeing

- Requires attention to employees' emotional, physical and mental health needs
- Provide support for employees as they attend to their/their families' needs while balancing team needs
- Equip team members to respond to change and uncertainty



What Steps Should Employers Take Now?





Steps to Fortify Your Frontline Leadership

- Invest in your managers throughout their lifecycle:
 - Recruiting, hiring and onboarding
 - Ongoing development and mentoring
- Establish/revisit your leadership philosophy outline clear expectations for managers.
- Train managers as your first line of discrimination and harassment prevention.
- Prioritize managers' time to focus on their staff.
- Ensure management is not the only way to advance in your company.



Gaining Insights About Your Managers



360 reviews



Skip level discussions



Climate and pulse surveys



Performance review metrics for leadership effectiveness



People Analytics – turnover, promotions, diversity



Reminder – Don't neglect the development of future leaders.







Manager actions/behaviors will create increasing risks or benefits.



It should be a business priority to support and develop managers.



Set clear expectations and inspect what you expect from your managers.



The credibility of your business and your brand is only as strong as your weakest manager.

Each manager is "the company" to their employees.





Kelly Yeates Vice President, Service Operations



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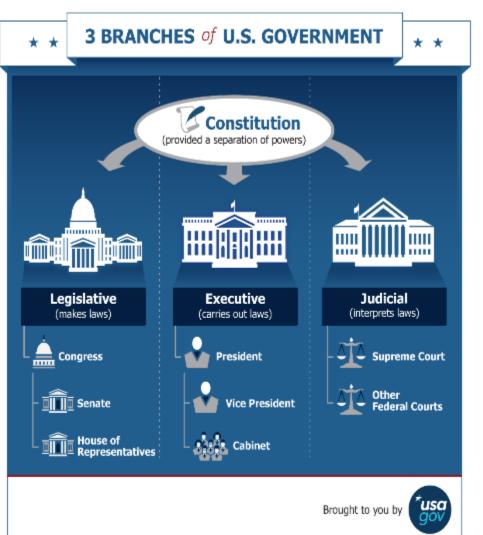
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W Jackson Walker LLP HR that Makes a Difference **Employment-Based Immigration and the Biden** Administration Sang Shin Jackson Walker

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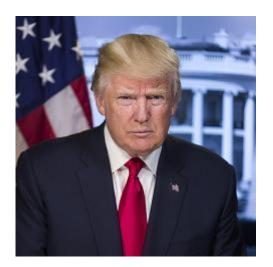
Civics Revisited...



- US Department of Homeland Security (Benefit-giving arm)
 - US Citizenship and Immigration Services
 - US Customs and Border Protection
 - Immigration & Customs Enforcement
- US Department of State (Keep the bad people out)
- US Department of Labor (labor-related processes)

President Trump

- Trump's Executive Orders Travel Bans
 - Country Specific (i.e. Muslim Ban)
 - Ban on new H-1Bs, L-1s, J-1s and LPR (COVID related?)
- Buy American/Hire American



- Halted regulatory proposals increasing prevailing wage salaries
- Heightened, Audits, Requests for Evidence, Denials, Site Visits

President Biden

- Legislative Proposals
- Reversed most bans (non-COVID related)
- Regulatory proposals increasing prevailing wage salaries halted
- Heightened, Audits, Requests for Evidence, Denials, Site Visits?
- Friendlier Immigration Policies?



Travel Bans

- Travel banned to U.S. if physically present in last 14 days in: China, India, U.K., Ireland, Schengen Area, Brazil & South Africa
- Exceptions for U.S. Citizens, Permanent Residents, certain family members
- National Interest Exemption (critical infrastructure, healthcare, etc.).



• Creative Travel solutions

Processing Times – Expect Delays



- Temporary visas up to 8.5 months
- Green Cards up to 30 months
- Embassies/Consulates COVIDbased closures (backlogs)
- Department of Labor up to 1 year

*Processing times may last beyond quoted timeframes

Takeaway Points



- Proactive Planning foreign national employment – create a plan
- Various factors must be considered by employers business and individual interests
- Compliance should be at top of mind
- Things should get better

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Questions?



CLE course #174118323/ HRCI ID No. 556416/ SHRM ID No. 21-QVAHH

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